

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32573
G/kmb

_____AD3d_____

Argued - September 30, 2011

WILLIAM F. MASTRO, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
PLUMMER E. LOTT, JJ.

2010-01538

DECISION & ORDER

Patryk Janiak, plaintiff-respondent, v Shelia Ewall,
appellant, Ewall & Ewall, defendant-respondent.
(and a third-party action)

(Index No. 28387/07)

Michael E. Pressman, New York, N.Y. (Tod S. Fichtelberg of counsel), for appellant.

Kuharski, Levitz & Giovinazzo, Staten Island, N.Y. (Lonny Levitz of counsel) for
plaintiff-respondent.

Andrea G. Sawyers, Melville, N.Y. (David R. Holland of counsel), for defendant-
respondent.

In an action to recover damages for personal injuries, the defendant Shelia Ewall appeals, as limited by her brief, from so much of an order of the Supreme Court, Suffolk County, (Spinner, J.), entered December 24, 2009, as denied that branch of her motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against her and granted the cross motion of the defendant Ewall and Ewall for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the appeal from so much of the order as granted the cross motion of the defendant Ewall & Ewall for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is dismissed, as the defendant Shelia Ewall is not aggrieved thereby (*see* CPLR 5511); and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

October 18, 2011

Page 1.

JANIAK v EWALL

ORDERED that one bill of costs is awarded to the plaintiff and to the defendant Ewall and Ewall, payable by the defendant Shelia Ewall.

The plaintiff owned his own contracting company and was working on a job at premises owned by Sheila Ewall, incorrectly sued herein as Shelia Ewall (hereinafter the appellant), and leased by the defendant Ewall and Ewall (hereinafter the Firm). The plaintiff allegedly was injured when he fell from an A-frame ladder as he was removing the sleeve of an air conditioning unit at the premises. The plaintiff commenced this action against the defendants alleging, inter alia, violation of Labor Law § 240(1). The Supreme Court, among other things, denied that branch of the appellant's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against her, and granted, without opposition from the appellant, the Firm's cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

The appellant is not aggrieved by the portion of the order which granted that branch of the Firm's cross motion which was for summary judgment dismissing the complaint insofar as asserted against it, and likewise is not aggrieved by the portion of the order which granted that branch of the Firm's cross motion which was for summary judgment dismissing all cross claims insofar as asserted against it, as she did not oppose the cross motion (*see Ponce-Fransisco v Plainview-Old Bethpage Cent. School Dist.*, 83 AD3d 683; *Mixon v TBV, Inc.*, 76 AD3d 144; *Giraldo v Morrissey*, 63 AD3d 784; *Nunez v Travelers Ins. Co.*, 139 AD2d 712; *Ciaccio v Germin*, 138 AD2d 664). Accordingly, her appeal from those portions of the order must be dismissed.

The Supreme Court properly denied that branch of the appellant's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) insofar as asserted against her, as the evidence submitted in support of the motion failed to establish, as a matter of law, that the ladder from which the plaintiff fell afforded proper protection or that the plaintiff's own conduct was the sole proximate cause of his injuries (*see Merriman v Integrated Bldg. Controls, Inc.*, 84 AD3d 897; *Delahaye v Saint Anns School*, 40 AD3d 679; *cf. Chin-Sue v City of New York*, 83 AD3d 643). Since the appellant did not establish her prima facie entitlement to judgment as a matter of law, it is unnecessary to consider the sufficiency of the plaintiff's opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The appellant's remaining contentions are without merit.

MASTRO, J.P., ANGIOLILLO, BELEN and LOTT, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court